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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1972
No. 72-5619

ROBERT BEECH,

Petitioner

v.

D. J. MELANCON and P. J. GALLO,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION NOT PRINTED

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QUESTION PRESENTED

Whether the Court of Appeals erred in holding that the trial court was not guilty of clear error in concluding that the defendants were justified in the use of deadly force to apprehend the plaintiff-petitioner, a fleeing felon.

STATEMENT OF THE CASE

FACTS

Respondents reject as incomplete and in part misleading the statement of the facts as presented in the petition, pp. 3-4. For a more complete and accurate exposition of the facts presented in evidence, respondents recommend for the Court's consideration here the summary of the facts as written in the first, second, third and fifth paragraphs of the Memorandum Opinion rendered by the District Court, pp. 1-3 of the appendix to the petition.

HISTORY

Respondents accept petitioner's statement of the "Proceedings Below," pp. 4-5, as being an accurate chronological history of the case below.

However, respondents would point out that the material included in the second paragraph, dealing with complainant's allegations regarding the Memphis Chief of Police, Henry Lux, is irrelevant to the matters appropriate for consideration by this Court. The complaints regarding Chief Lux were dismissed at the trial level. This dismissal was not complained of on appeal, and hence any reference to the substance of the allegations against Chief Lux here is irrelevant and obviously intended to inflame the reader of this petition. Respondents particularly object to the inclusion of such allegations as "...to employ deadly force...where means short of deadly force would suffice...", and "...pattern and practice...relying upon deadly force as the principal means of apprehending...", inasmuch as these allegations have no basis in fact, they were dismissed summarily, and their dismissal was not reviewed by the Court whose judgment is being questioned by this petition.

Respondents also note that on p. 5 of the petition, petitioner's summary of the Court of Appeals holdings includes a clear misstatement of that court's holdings. In (3), the court is stated to have held that "...The officers were entitled to act on the presumption that the statute was constitutional without incurring any civil liability for the consequences of their use of deadly force." This is not an accurate statement of that court's ruling, as a most casual reading will indicate. The clear inference arising from the opinion is that if the actions of the officers under the circumstances in which they acted had been unreasonable or unjustified, there would have been civil liability.

ARGUMENT

I. The "Question Presented" stated in the petition p. 2 is not the proper question for consideration by this Court.

Respondents submit that the sole and proper question for review by this Court is as stated in this brief, supra. It is noted that this is the question reviewed by the Court of Appeals as "the single issue here presented."

Petitioner's wording of the question presented implies that the Court of Appeals held that the respondents were immune from liability as long as the state statute had not previously been held unconstitutional. Respondents assert that the appellate court made no such ruling, by any stretch of the imagination. That court merely held that these respondents were not liable because they had acted in a reasonable manner; it did not rule they were immune under the statute. Clearly implied in the court's ruling is the principle that these officers could have been held liable even if the statute had been previously ruled constitutional.

II. Petitioner's "Introduction", pp. 6-9, to his "Reasons for Granting the Writ", includes various assertions which misstate the meaning and impact of the ruling of the court below.

A. The "Procedural/Substantive distinction". Petitioner cites Pierson v. Ray, 386 U. S. 547 (1967), and states as follows:

> "Pierson, we submit, established no more than that a police officer should not be required to determine the constitutionality of state criminal statutes before he arrests a citizen for violating such statutes; that is, where his conduct in effecting the arrest is constitutional, i.e., based upon probable cause, he should enjoy immunity from civil liability in damages to a person arrested for violating the unconstitutional statute."

In view of the Pierson rule, supra, where emphasis is placed on the probable cause basis of the officer's conduct, and on the theory that the officer is not required to determine the constitutionality of a statute defining criminal conduct, respondents deny that petitioner's procedural/substantive distinction has any validity. Whether the officer is acting to arrest under a substantive criminal statute, or under a "procedural" statute which outlines guidance for him as to the permissable means for use in effecting the arrest, or even acting simultaneously under both types of statutes (which is inevitably the case), the true test of whether the officer has exceeded the bounds of his authority and the bounds of due process, is whether "his conduct in effecting the arrest is constitutional, i.e., based on probable cause." Hence, the procedural/substantive distinction is a deviation from reality, because in the instant case, as in virtually every arrest situation, the officer is acting simultaneously on the basis of probable cause, both as to the substantive statute (whether the felony was committed as defined by that statute) and also as to the "procedural" statute (whether the means to be employed are

proper under the circumstances). Respondents therefore contend that whether an officer is acting under a substantive statute, or a "procedural" statute, or both, the test of his conduct is reasonableness and probable cause. Naught is gained by petitioner's assertion that Pierson deals only with substantive statutes. The rule of probable cause found in Pierson is equally applicable to both types of statutes, whereunder the conduct of an officer is to be tested.

B. Petitioner asserts that the Court of Appeals has unconstitutionally extended the Pierson ruling, in that it decrees that an officer, pursuant to any statute, procedural or substantive, is immune from liability, no matter how unconstitutional his conduct. Respondents refute this expression of the Court's holding, and say that the rule of that opinion cannot be any stretch of the imagination be read to have so held. The Court's opinion holds that there was not clear error committed by the District Court in finding the officer's use of deadly force justified under the facts. On this finding of fact on the evidence, in no way could it be argued that the appellate court has extended Pierson. On the contrary, the Court of Appeals has clearly and explicitly followed the Pierson rule, by resorting to the probable cause (reasonableness) test in measuring the officers' conduct.

C. At p. 7 petitioner states that "Under its (the Court's ruling) provision, resort to personal damage actions against peace officers by persons as a means of challenging unconstitutional state statutes is effectively foreclosed." Respondents vehemently reject this reasoning, for in the Court of Appeals opinion, the majority of the Court expressly cited a three-judge District Court ruling upholding the constitutionality of the Tennessee statute, thus approving the finding that the statute is constitutional. Cunningham v. Ellington, 323 F. Supp. 1072. Though the Court of Appeals concurring opinion writer does not reach a ruling on the constitutionality of the statute, his express avoidance of that

issue indicates he, too, considers the majority opinion to have reached and upheld the constitutionality of the statute. Under these circumstances it is futile to argue that a constitutional test of a statute has been foreclosed. On the contrary, the constitutionality of the statute has been considered and upheld, not foreclosed, by the Courts below, and no appeal was taken to test the question.

D. Petitioner contends that the ruling of the court below produces a situation in which states can effectively immunize their officials from liability for conduct that would otherwise violate federal law. Respondents see no difference between Tennessee and Federal tests of probable cause and reasonable conduct. The Federal Courts below have ruled these officers' conduct reasonable. Under both Federal and state law, their findings have not distinguished between the Federal and state tests of conduct; they have applied the same tests, for the state and Federal tests are the same.

E. Petitioner lastly states in his "Introduction" p. 9 that "By immunizing police officers...the Sixth Circuit has effectively foreclosed any Federal court challenge to...application of this common law doctrine relating to the use of deadly force." In applying the reasonable and justified test to the conduct of the officers, the Court has clearly not "immunized" the officers from liability. If the District Court had made "clear error" in finding the officers' use of the deadly force unreasonable, the Sixth Circuit's opinion indicates that liability would have been found. There is no immunity afforded by such a holding.

III. There is no conflict between the opinion of the Sixth Circuit and prior decisions of other circuits or this Court.

A. In his Reason I.A., pp. 9-11, petitioner cites cases to establish that state officials may be held liable under 42 U.S.C. §1983 for damages though acting in conformity with State

law, and to establish that good faith reliance by state officials is not a valid defense to civil rights damage actions. Respondents do not quarrel with these propositions, nor with petitioner's authorities. However, in simply holding that the officers in the instant case acted in a reasonable fashion under the circumstances, the Sixth Circuit's opinion in no way conflicts with the previous rulings. Clearly implied is that if the officers had not been justified in their actions, they would have been liable.

B. In Reason I.B., pp. 11-12, petitioner contends that the court below has erased the distinction in prior opinions of this Court between criminal and civil liability. Petitioner specifically argues that the court has followed more closely the Screws standard regarding criminal liability (intent to deprive of civil rights) than the Monroe standard of civil liability (responsibility for natural consequences). Screws v. U.S., 325 U. S. 91 and Monroe v. Pape, 365 U. S. 167. Respondents note that in applying the reasonableness test, the court below has not required a showing of specific intent, nor has it relied on a good faith test. It has simply said that as long as the officers' acts were justified under the circumstances, they were not liable. This reasoning is in the nature of tort theory, and comes squarely under the Monroe type test and not under the Screws test; a bad faith showing is not necessary to establish unreasonableness.

C. Petitioner's Reason I.C., pp. 13-14, alleges that the Sixth Circuit's ruling prevents personal damage actions from testing the constitutionality of state statutes. This assertion has been dealt with heretofore in this brief. Suffice it to say that this very suit did serve to test the constitutionality of the Tennessee statute, and that the court below cited and approved another ruling that specifically upheld the statute as constitutional.

D. In his last conflict-oriented Reason I.D., p. 15, petitioner argues that the Sixth Circuit has contradicted previous decisions which rest on the unconstitutional application of state statutes. He contends that even though discriminatorily applied, a statute could not be the basis for recovery under the court's opinion. There is no logic in this contention, in that it is patently clear under the opinion of the court below that if the officers had not been justified by the circumstances, they would have been liable. The essence of the issue before the courts below was whether the statute had been constitutionally (reasonably based on probable cause) applied by the officers. They found that under the circumstances the statute had been reasonably applied. There is no conflict here.

IV. There was no holding by the Court below that the use of deadly force is constitutional "regardless of circumstances".

Petitioner's final Reason II., pp. 16-20, claims an issue of great national importance, in that the Court below in effect held that the use of deadly force is constitutional regardless of circumstances. If the court had so held, respondents would readily agree that the ruling should be reviewed by this court. But the court below did not so hold. Throughout the Sixth Circuit's opinion, and the opinion of the trial court which it affirmed, is a thorough consideration of and regard for the circumstances surrounding this particular use of deadly force. Clearly, the rulings of the courts below are limited strictly to the facts and circumstances here pertaining. There is in their rulings no blanket approval whatsoever for indiscriminate, hasty use of deadly force to apprehend regardless of circumstances.

At p. 17, petitioner states that "...state statutes like T.C.A. §40-808 which appear to authorize the use of deadly force by police officers to apprehend fleeing felons who pose no threat to the safety of officers or third persons have been a matter of debate in the United States for nearly a hundred

years." Respondents deny that T.C.A. 40-808 authorizes the use of deadly force on felons "who pose no threat to the safety of officers or third persons." As interpreted by the Tennessee courts, specified in the opinion by the District Court below, and approved by the Court of Appeals, to be justified in the use of deadly force, an officer must be dealing with a felon, must have notified him of the intent to arrest, and must reasonably believe that use of less means would fail to prevent the escape. Cunningham v. Ellington, supra. Under the facts of this case, there is ample basis for a reasonable belief that the use of lesser means, e.g. chasing on foot, would have either failed or have subjected the officers to serious bodily harm or death. Hence there is in the Sixth Circuit's ruling a regard for the factors of violence and potential for harm. The opinion is not based on consideration of a mere non-violent felony. The officers shouted halt orders and warnings, actions short of and prior to the use of deadly force, and both lower courts were careful to point this out. Also, the facts indicate considerable flight occurred prior to the shooting, indicating reasonable effort to halt the escapers verbally before firing. Under these circumstances, the courts were unable to say that if chase had been given, there would have been "no threat to the safety of the officers or third persons." Further, under the facts of this case, it could not be said that the statute, as applied to those facts, authorized the use of deadly force where there was no violence or threat of harm involved.

Petitioner at p. 18 points out the right to be shielded from "summary punishment". Respondents would answer, as did the three-judge court in Cunningham, supra, that "The answer to this contention is, again, that we are not dealing with punishment. Moreover, all that need be done by one sought to be arrested is to submit to the arrest and he will enjoy these rights."

Again at p. 18, petitioner argues that the Tennessee statute, as applied by the federal courts in this case, becomes

the common law rule that the use of deadly force is justified against any felons. Respondents would point out that a serious crime, burglary, was involved in this arrest effort. Burglary carries a potentially heavy penalty of long incarceration. It is readily foreseeable that those observed in the act of committing such a felony would resort to great lengths and desperate measures to avoid capture. Witnesses, family members, and investigating officers are all potentially in danger when confronting one who has been so involved. Thus, under the facts of this case, it is an unwarranted stretch of these facts to argue that the rulings below hold that deadly force is authorized against any felon. The statute allows only the "necessary means". As applied to this case, to hold that the use of deadly force was reasonably necessary was clearly not extending the use of deadly force to any felon under any circumstances. The Court of Appeals applied basic constitutional law principles to this felon under the circumstances of this case, and found that his civil rights has not been unjustifiably violated, either by the wording of the statute, its interpretation by the courts, or by the application of the statute by the officers.

Finally, at p. 20, petitioner quotes from Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics., 403 U. S. 388, 91 S. Ct. 1999. Respondents would focus attention in that opinion on the words "gravity and need". In the case at hand, there is a felony of serious gravity, and there is a strong public need to apprehend the felons who, unless captured, might become physically dangerous fugitives. Under the Bivens standard, the police response here has clearly met the test, and in so holding, the Courts below have but applied firmly established legal principles to the facts at hand.

CONCLUSION

Respondents respectfully submit that on the basis of the foregoing there are no special and important reasons for

granting the writ of certiorari, there are no conflicts in the opinion of the Court of Appeals for the Sixth Circuit with opinions of other circuits or with opinions of this Court, and there has not been decided by the Court of Appeals an important question of federal law which has not been, but should be, settled by this court.

The respondents, therefore, conclude and urge that the petition for the writ should be denied.

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CERTIFICATE OF SERVICE

I, Frierson M. Graves, Jr., certify that I am a member of the Bar of the Supreme Court of the United States and that I have served copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari in the above-captioned matter upon counsel for petitioner by depositing the same in the United States mail, airmail or first class postage prepaid, addressed as follows:

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All parties required to be served have been served. Dated this_____day of November, 1972.

_____

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